No. 80-1302

In the Supreme Court of the United States

OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, LARRY D. LAHMAN
and STEPHEN JONES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE BRIEF OF DAVID M. COOK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April, 1981

QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit err in affirming the order of the District Court which dismissed Petitioner's action against the Respondent David M. Cook for failure to state a claim upon which relief could be granted?

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Respondent David M. Cook, by and through the Attorney General of Oklahoma, respectfully prays this Court to affirm the decision rendered by the United States Court of Appeals for the Tenth Circuit in *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980).

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, reported as *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980), appears in Appendix "A" herein.

STATEMENT OF THE CASE

In July of 1979, Earl David Shaffer (hereafter "Petitioner") commenced an action in the United States District Court for the Western District of Oklahoma (hereafter

"District Court") pursuant to 42 U.S.C. §§ 1983, 1985 and 1986 against David M. Cook, Judge of the District Court of Oklahoma County, State of Oklahoma (hereafter "Respondent"), Larry D. Lahman, an Enid, Oklahoma attorney, and Stephen Jones, also an attorney from Enid, Oklahoma. The action was prompted by Case No. CJ-76-3316 in the District Court of Oklahoma County, wherein Petitioner was plaintiff, Stephen Jones was defendant, Larry Lahman was defendant's counsel and Respondent was the assigned Judge.

In his complaint, Petitioner alleged that Respondent and the named defendants conspired in the state court proceeding to defraud Petitioner and deprive him of his civil rights, specifically a fair trial. Summarized, Petitioner alleged that Respondent breached his judicial duty in the following particulars:

a. That he exhibited "an actual bias and prejudice;"

b. That he denied to Plaintiff certain Constitutional guarantees, to-wit: fair and impartial hearing, equal protection of the law and due process of law;

c. That he conspired with Jones and Lahman to "defraud" Plaintiff of those Constitutional rights;

d. That he made certain "unreasonable, dishonest and unlawful decisions" in furtherance of that conspiracy;

e. That his acts were intentional;

f. That he failed to disqualify himself upon Plaintiff's request; and

g. That the foregoing violations were of such magnitude as to constitute "non-judicial" acts tantamount to divestiture of jurisdiction.

By reason of Respondent's breaches of duty, Petitioner alleged damages in the nature of expense to remedy the aforesaid injustices through necessary appeal, mental and physical pain and suffering, loss of health and nervous frustration and injury to his business and reputation.

To the complaint, Respondent moved to dismiss the cause pursuant to Rule 12(b)(6), Fed.R.Civ.P., on the ground, among others, that Respondent was immune from suit for his judicial acts. The District Court, taking all the well pleaded factual allegations of Petitioner as true and indulging all reasonable inferences therefrom in favor of Petitioner, determined that the following factual allegations had been made against Respondent:

> "(1) Judge Cook was purporting to act at all times as an Oklahoma County District Judge.
>
> "(2) Judge Cook refused to disqualify himself when requested by the plaintiff.
>
> "(3) Judge Cook and defendant Lahman were seen by the plaintiff in the chamber hallway of the defendant judge before each hearing in the state court case.
>
> "(4) The defendant judge made the following statements in open court:
>
> "(a) 'What do you want me to do, dismiss this lawsuit?'
>
> "(b) 'I can't dismiss this case with prejudice, but I wish I could.'
>
> "(c) 'I'll remember this case.'
>
> "(d) 'That won't be tolerated. Oh, I'm impressed with your jury speech.'

"(e) 'You stuck with that answer at trial and you're going to regret it.'

"(5) The defendant judge accepted certain statements made by the defendant Lahman regarding plaintiff's conspiracy claim and signed an order on July 15, 1977, striking conspiracy from plaintiff's petition.

"(6) Judge Cook signed an order in Case No. CJ-76-3316 on October 28, 1977, stating his intention and desires to dismiss plaintiff's case. This was also discussed in open court." [Pages 3 and 4 of District Court's order in *Shaffer* v. *Cook*, No. CIV-7[illegible]-805-E (W.D. Okl. Oct. 11, 1979)].

In view thereof, the District Court in *Shaffer* v. *Cook*, supra, sustained Respondent's motion to dismiss concluding that Respondent, at all times material, was acting in his capacity as a state district court judge and was, thus, immune from liability for damages.

The United States Court of Appeals for the Tenth Circuit, in *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980), affirmed the judgment of the District Court upon determining that "[n]o allegation of the complaint indicates that appellee, Judge Cook, acted outside the scope of the jurisdiction of his court." (634 F.2d 1260).

ARGUMENT

RESPONDENT IS IMMUNE FROM SUIT UNDER THE DOCTRINE OF JUDICIAL IMMUNITY.

Respondent is immune from civil suits based on acts or omissions occurring in the exercise of his judicial function. The jurisdiction of the trial court having vested, all activities of the judge during sessions of court are immune from suit or question.

This Court in *Pierson* v. *Ray*, 386 U.S. 547 (1967) stated as follows:

> ". . . Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335, 20 L ed 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (*Scott* v. *Stansfield*, LR 3 Ex 220, 223 (1868), quoted in *Bradley* v. *Fisher*, supra, 349; note, at 350, 20 L ed at 650.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." (386 U.S. 553, 554).

Similarly, in *Stump* v. *Sparkman,* 435 U.S. 349 (1978), this Court stated that:

> "The Court of Appeals correctly recognized that the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him . . . [T]he scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' 13 Wall, at 351, 20 L Ed 646." (435 U.S. 356, 357).

This Court in *Stump* v. *Sparkman,* supra, further stated that the test for determining whether an act by a judge is a judicial act, thus conferring immunity, is (1) whether it is an act normally performed by a judge and (2) whether the parties dealt with the judge in his judicial capacity.

The court over which Respondent presides is one possessing unlimited original jurisdiction over all justiciable matters. See Okla. Const., Art. 7, § 7 and 20 O.S. 1971, § 91.1. Furthermore, assuming the facts alleged in Petitioner's complaint to be true, *i.e.,* that Respondent exhibited a pattern of bias and prejudice, denied Petitioner certain fundamental rights, improperly failed to disqualify himself, etc., Petitioner alleged and his complaint reflected that Respondent "at all times hereinafter stated was purporting to act as a [District] Judge for the County of Oklahoma. . . ." All acts complained of were judicial acts—that Respondent allegedly was biased, prevented a fair and im-

partial trial, made unlawful decisions, and denied Petitioner due process. The prejudicial statements alleged to have been made by Respondent were statements made in open court in the conduct of judicial proceedings. Moreover, the allegation that defendant Lahman was seen with Respondent in the chamber hallway before each hearing in the state court proceeding could suggest impropriety only if it can be related to subsequent actions taken by the judge while conducting judicial proceedings in open court.

No act was alleged to have occurred and no duty was alleged to have been breached which did not arise from Respondent acting in his official capacity as the assigned district judge in the state court action. All of the acts complained of by Petitioner were judicial acts, *i.e.*, acts normally performed by a judge, and the parties, including Petitioner, dealt with Respondent in his official judicial capacity. Thus, Respondent enjoys absolute immunity from the present action.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be denied leaving in force and effect the decision rendered in *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980).

Respectfully submitted,

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April, 1981

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Response Brief were mailed to the persons listed below on the ..... day of April 1981, by placing same in the U.S. Mail with postage fully prepaid.

All parties required to be served have been served.

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APPENDIX A

[Filed November 5, 1980]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

EARL DAVID SHAFFER, Plaintiff-Appellant,	)	
v.	)	
	)	No. 79-2201
DAVID M. COOK, LARRY D. LAHMAN, and STEPHEN JONES, Defendants-Appellees.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. 79-0805)

Submitted on the briefs pursuant to Tenth Circuit Rule 9: Earl David Shaffer, pro se.

Jan Eric Cartwright, Attorney General, and Manville T. Buford, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma, for Defendant-Appellee David M. Cook; Elliott C. Fenton of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for Defendant-Appellee Larry D. Lahman; and James Sears Bryant, Enid, Oklahoma, for Defendant-Appellee Stephen Jones.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the

determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court dismissing appellant's complaint pursuant to Fed. R. Civ. P. 12(b) (6). The complaint was brought pursuant to 42 U.S.C. §§ 1983, 1985 and 1986, alleging violation of the appellant's civil rights. It alleged that appellee Cook (an Oklahoma state trial judge) and appellees Jones and Lahman (attorneys who were involved in a state case brought by appellant and dismissed by appellee Cook) conspired to deprive appellant of his civil rights, specifically a fair trial.

No allegation of the complaint indicates that appellee, Judge Cook, acted outside the scope of the jurisdiction of his court. Thus, he is absolutely immune from liability for his judicial acts. Stump v. Sparkman, 435 U.S. 349 (1978).

As to the claim against the two attorneys, the district court, in dismissing the action against them, concluded that "a private person who is alleged to have conspired with a state district judge who is entitled to immunity cannot be held liable. . . ." While we agree that the conspiracy element of appellant's claim, *see* Adickes v. S. H. Kress and Co., 398 U.S. 144, 150 (1970), would not be fulfilled even if appellant's allegations were true, we have recently held that the immunity of a state official will not necessarily protect a private individual alleged to have conspired with him. Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980). The test laid out in *Norton* to determine whether a private individual has actively conspired with an immune state official is as follows:

> It is our view that the critical inquiry in making this determination is: Has the plaintiff demonstrated the existence of a significant nexus or entanglement between the absolutely immune State official and the private party in relation to the steps taken by each

> to fulfill the objects of their conspiracy? The resolution of such issues must, of necessity, be made on a case-to-case basis.

620 F.2d at 1380.

Appellant's only allegation supporting his conspiracy theory against the attorneys is that he saw one of them speak with the judge in the courthouse before each hearing. The complaint thus concludes that that attorney, and the other by association apparently, had defrauded him in a conspiracy with the court. Nothing in the complaint indicates that the court or the attorneys were acting outside the confines of the neutral function of a judicial forum. There is no cause of action under the Civil Rights Act in this case where the state did no more than furnish a forum to private parties and had no interest in the outcome. *See* Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1326 (10th Cir. 1978). We have stated before that "[l]awyers do not act under color of state law solely by engaging in private litigation on behalf of their clients." Brown v. Chaffee, 612 F.2d 497, 501 (10th Cir. 1979). Appellant's amended complaint fails to allege the kind of conspiratorial nexus between Judge Cook and the attorneys contemplated in *Norton* that would support a cognizable § 1983 or § 1985 non-immune conspiracy intended to deprive appellant of his constitutional rights. The *pro se* complaint was thus properly dismissed.[1] *See* Estelle v. Gamble, 429 U.S. 97, 107 (1976).

Accordingly, the judgment of the district court is affirmed. The mandate shall issue forthwith.

---

[1] Appellant's § 1985 and § 1986 claims were also properly dismissed due to appellant's failure to allege any "invidiously discriminatory motivation" of appellees. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (§ 1985); Hahn v. Sargent, 523 F.2d 461, 469-70 (1st Cir. 1976), *cert. denied*, 425 U.S. 904 (1976) (§ 1986 claim is dependent upon successful § 1985 claim).